not have equal weight at least with the testimony of an unimpeached witness, and should be received with great caution, if at all.[10] Accordingly, many States have provided by statute that the religious sanction, while still material in determining the weight and effect to be given, shall no longer be a condition to its admission.[11] It is also urged that not only are dying declarations not spontaneous outcries and not likely to express an honest belief as to what happened at the moment, but they are statements usually made after ample reflection, colored and perhaps innocently exaggerated by an overwrought condition of the mind. A supposed lack of administrative necessity in other cases and a distrust of the probative force of the dying declaration led to restricting the rule to homicide cases only.[12]

On the other hand, there are very cogent reasons in favor of extending the admission of dying declarations to all classes of cases. The fear of impending death would seem to be a very powerful incentive to truth,[13] whether the theory of admission rests upon religion or upon a physical revulsion experienced at the time of death. Even if it be true that necessity is the only ground for their admission to-day,[14] it certainly seems that the modern rule rests upon an illogical assumption that it is not as important to punish robberies and other crimes as homicides.[15] The fear that skepticism will in some cases render the statements unreliable could very well be taken into account by the jury in weighing the full effect to be given to each declaration.[16]

REGULATION OF RATES OF PUBLIC SERVICE CORPORATIONS.—It is no longer a matter of dispute that the establishment of reasonable rates is a function of the legislature rather than of the judiciary[1] whether the rates are prescribed directly or through commissions,[2] and that their constitutionality under the due process of law clause of the Fourteenth Amendment is subject to review by the courts.[3] This power was recognized as the economic substitute for competition in an ancient rule of the common law which declared that a person engaged

[10]See 41 American Law Rev., *supra;* Pyle *v.* State (1908) 4 Ga. App. 811.

[11]See People *v.* Sanford (1872) 43 Cal. 29; State *v.* Elliott, *supra;* State *v.* Ah Lee (1880) 8 Ore. 214.

[12]See 41 American Law Rev., *supra.*

[13]Parker *v.* State (1909) 165 Ala. 1; Hill *v.* State (1871) 41 Ga. 484.

[14]State *v.* Knoll, *supra;* 4 Chamberlayne, Evidence, § 2812.

[15]2 Wigmore, Evidence, § 1436.

[16]See Rhea *v.* State (1912) 104 Ark. 162; Nesbit *v.* State (1871) 43 Ga. 238.

[1]See Janvrin, Petitioner (1899) 174 Mass. 514, 517; Interstate Commerce Commission *v.* Cincinnati, N. O. & T. P. Ry. (1896) 167 U. S. 479, 499.

[2]Although the exercise of this power by commissions is in the nature of legislation, it has been regarded as merely a delegation of discretionary authority to be exercised under an existing law, and is not, therefore, in conflict with the principles of American government. State *v.* Chicago, M. & St. P. Ry. (1888) 38 Minn. 281; see Knoxville *v.* Water Co. (1908) 212 U. S. 1.

[3]Chicago, M. & St. P. Ry. *v.* Minnesota (1890) 134 U. S. 418; The Minnesota Rate Cases (1912) 230 U. S. 352.

in a public employment was entitled to receive only a reasonable compensation for each separate service.[4] Although the courts have experienced difficulty enough in deciding what may be considered a fair return, the problem of finding the value upon which this return is to be based is even more complex.[5] One of the causes of the confusion is the logical difficulty of adverting to the true, *i. e.*, the market value of the concern, because that value is determined by the earning capacity,[6] which in turn depends somewhat upon the rates charged.[7] Thus it is apparent that the methods of valuation in condemnation proceedings or in finding taxing value are of little or no use,[8] and that the valuation for rate-making purposes, to a certain extent at least, must be purely speculative. There are, however, two principal theories as to the manner in which this value can be substantially determined, (1) the actual investment,[9] and (2) the present value.[10] The latter, which means practically the cost of physical reproduction less depreciation and plus going-concern value,[11] has received more judicial sanction, although the initial cost has also been regarded as of materiality in determining the reproductive cost.[12] The Supreme Court, while displaying a distinct inclination to favor the reproduction test,[13] has never undertaken the well-nigh impossible task of formulating any hard and fast rule, but has been content to enumerate the elements to be considered without attempting to indicate the ratio of their importance.

Under the present value test, the unearned increment accrues in favor of the public utility, and is necessarily considered in appraising

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[4]See Allnutt *v.* Inglis (1810) 12 East *527; Mobile *v.* Yuille (1841) 3 Ala. 140.

[5]See 13 Columbia Law Rev. 567, for a discussion of the difficulties which attend the valuation of railroads for the purposes of rate-regulation.

[6]13 Columbia Law Rev., *supra,* p. 585.

[7]See Montgomery Co. *v.* Bridge Co. (1885) 110 Pa. 54. Nevertheless, the Supreme Court has considered the "probable earning capacity under particular rates" as one of the elements in determining the value of the business for rate-making purposes. Smyth *v.* Ames (1897) 169 U. S. 466; The Minnesota Rate Cases, *supra,* pp. 434, 435, 455.

[8]See Willcox *v.* Consolidated Gas Co. (1908) 212 U. S. 19, 51; Spring Valley Water Co. *v.* San Francisco (C. C. 1908) 165 Fed. 667, 696; but see State *v.* Savage (1902) 65 Neb. 714, 755, in which the court stated that there may be but one true value for rate-making or taxing purposes.

[9]Beale & Wyman, Railroad Rate Regulation, § 338; see Advances in Rates—Western Case (1911) 20 Int. Com. Rep. 307.

[10]The Minnesota Rate Cases, *supra;* San Diego Land & Town Co. *v.* Jasper (1903) 189 U. S. 439; Steenerson *v.* Great Northern Ry. (1897) 69 Minn. 353.

[11]See 13 Columbia Law Rev. 730.

[12]Smyth *v.* Ames, *supra;* Knoxville *v.* Water Co., *supra;* San Diego Water Co. *v.* San Diego (1897) 118 Cal. 556, 588. Although the actual investment test seems more in accord with the underlying principles of rate-regulation, Whitten, Valuation of Public Service Corporations, § 96, the harshness of inflicting such great losses upon stockholders who have purchased at a value above par, *cf. In re* Advance of Freight Rates—Eastern Case (1911) 20 Int. Com. Rep. 257, has militated against its adoption.

[13]Knoxville *v.* Water Co., *supra;* The Minnesota Rate Cases, *supra.*

the value of its property.[14] While this increment is usually an increase in land value, it is apparent that a corresponding increase in the value due to any other similar appreciation should be classified in the same way. In the recent case, however, of *People ex rel. Kings County Lighting Co.* v. *Willcox* (1914) 210 N. Y. 479, the contention of the plaintiff gas company that the value of its property was increased by reason of the paving of the streets above the gas mains, and that this increased value should be considered in regulating its rates, was rejected. In reaching this conclusion, the court seems to have been moved principally by considerations of public interest, and held that, since the company did not own the improvement and had not brought it about by its own labor, it was not entitled to charge increased rates because of the benefit conferred at public expense.[15] The decision puts a decided limitation upon the unearned increment theory, and consequently upon the reproduction test; but the limitation of the rule is a very reasonable one, and the result reached is eminently satisfactory from a practical standpoint as fair both to the public and to the company.

ACCRETION OF CAPITAL AS A BASIS FOR DIVIDENDS.—A stock corporation is required by law to fix an arbitrary sum as its par value capital stock;[1] if its total assets exceed this sum, the excess is surplus.[2] Since it is manifestly impossible, as well as unnecessary, to trace the exact items which constitute a surplus, their designation is left to the discretion of the directors.[3] They are free to deal with all the assets of the company, in deciding what shall be treated as capital stock and what as surplus, regardless of whether the source was consideration for stock, direct earnings of the enterprise, increase in the market value of property, or a loan.[4] Until so designated, the excess is in legal contemplation simply income. When the directors have classified the total assets, they may at regular intervals[5] appropriate the surplus which appears, for any proper corporate purpose. After the usual book

[14]See Willcox *v.* Consolidated Gas Co., *supra;* Shepard *v.* Northern Pac. Ry. (C. C. 1911) 184 Fed. 765, 806.

[15]See Cedar Rapids Gas Light Co. *v.* Cedar Rapids (1909) 144 Ia. 426, affirmed in 223 U. S. 655, in which a question similar to that in the principal case was disposed of in the same way, but where it also appeared that there were unpaved alleys in the vicinity which could have been utilized for gas mains.

[1]The requirement that capital must be paid up in full implies that a sum must be named. See N. Y. Stock Corporation Law (1909) §§ 50, 65.

[2]Williams *v.* Western Union Tel. Co. (1883) 93 N. Y. 162; Barry *v.* Merchants' Exchange Co. (N. Y. 1844) 1 Sandf. Ch. 280, 307. Before finding a surplus, however, it is not necessary to make up permanent capital which has been lost, Verner *v.* General, etc. Trust., L. R. [1894] 2 Ch. 239, or sunk in a wasting property. Lee *v.* Neuchatel Asphalte Co., L. R. [1889] 41 Ch. 1.

[3]2 Cook, Corporations (6th ed) § 545.

[4]See Mackintosh *v.* Flint & P. M. R. R. (C. C. 1888) 34 Fed. 582, 604; see Lubbock *v.* British Bank of South America, L. R. [1892] 2 Ch. 198.

[5]Foster *v.* New Trinidad, etc. Asphalt Co., L. R. [1901] 1 Ch. 208.